SUPREME COURT, U. S.

FILED

MAR 9 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1130

LEONARD E. NOREN and HARRY C. PERRY,
Petitioners,

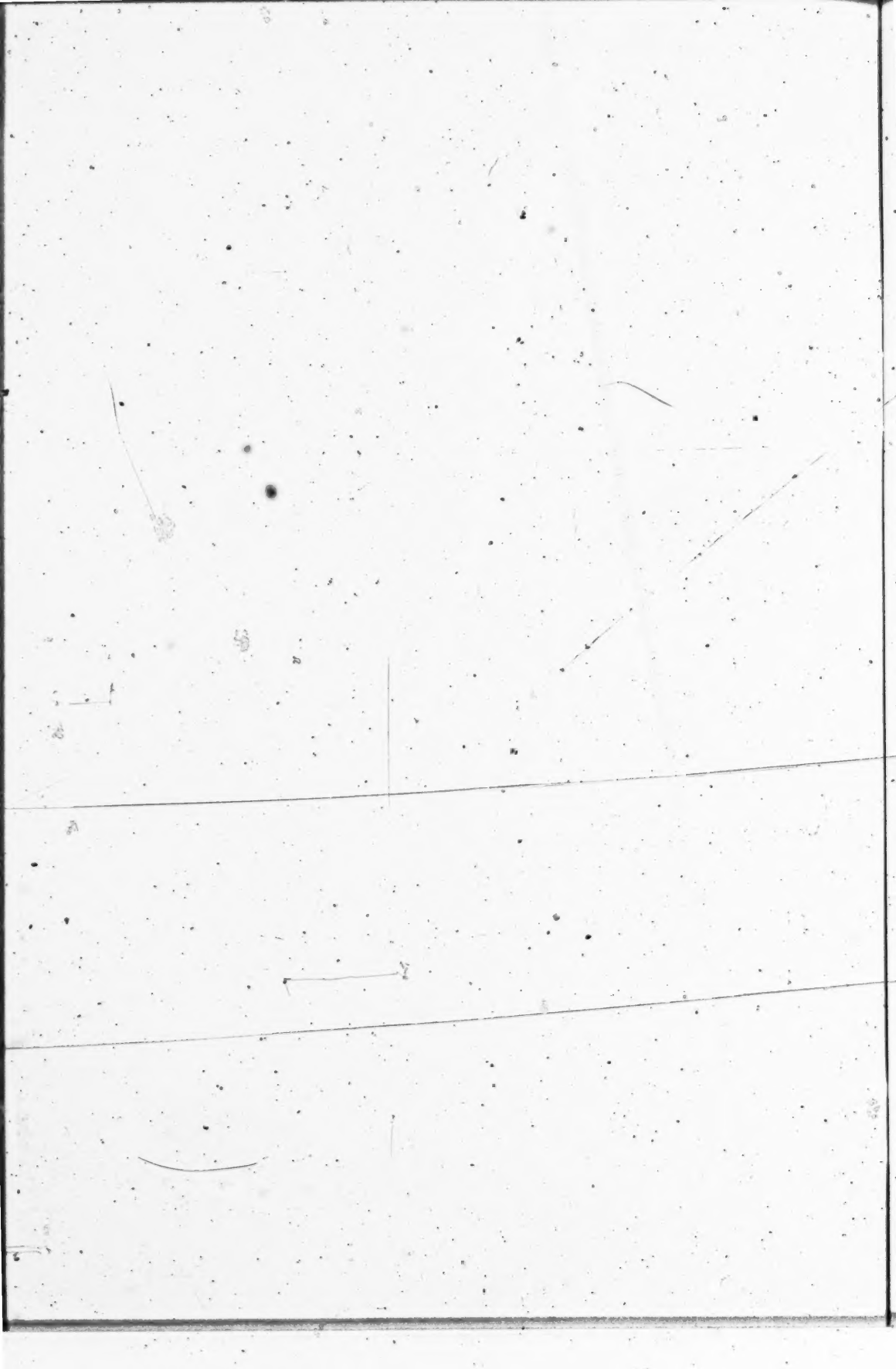
vs.

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

EDSON ABEL
P.O. Box 396
Middletown, California 95461
Attorney for Petitioners

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105



SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
The Reasons for Granting the Writ	5
The Conflict with Other Courts of Appeal	6
Conclusion	7
Appendices	

TABLE OF AUTHORITIES CITED

Cases	Pages
Arnold v. Guimarin Co., 280 F. 238 (1922)	6
Arnold v. Guimarin Co., 263 U.S. 427 (1923)	6
Bass v. Olsen, 327 F2d 662 (1964)	6
Bigart v. Goodyear Rubber Co., 361 F2d 317 (1966)	6
Diaz v. Crom, 195 F2d 517 (1952)	6
Fleming v. Van Der Loo, 160 F2d 905 (1947)	6
Ford Motor Co. v. NLRB, 305 U.S. 364 (1939, 6 Cir.)	5
Hartford A. & I. Co. v. Interstate Equipment Co., 176 F2d 419 (1949)	6
Katzenbuhler v. Talbot, 132 F2d 192 (1942)	6
Kelling Nut Co. v. National Nut Co., 145 F2d 418 (1944)	6
Long v. Union P.R. Co., 206 F2d 829 (1953)	6
Petersen v. Sampsell, 170 F2d 555 (1948)	6
School Dist. #5 v. Lundgren, 259 F2d 101	6
Smith v. Benedict, 279 F2d 211	6
U. S. v. Catlin, 324 U.S. 229	6

Statutes	
28 U.S.C.:	
Sec. 1254(1)	2
Sec. 1291	3
Sec. 1292	3
Sec. 1361	3, 5
Sec. 1391(e)	3, 5
43 U.S.C.:	
Sec. 315 f	5
Sec. 321	5

Constitution	
United States Constitution, Fifth Amendment	3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

LEONARD E. NOREN and HARRY C. PERRY,
Petitioners,

vs.

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Leonard E. Noren and Harry C. Perry pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 8, 1966.

OPINIONS BELOW

The opinions in the Courts below have not been reported. They are:

Judgment and opinion of the Court of Appeals for the Ninth Circuit (which is sought to be reviewed) rendered on November 8, 1966, copy of this judgment and opinion together with the order denying a rehearing are set forth in Appendix A. (R-191-4)

Memorandum and Order of the United States District Court for the Southern District of California, Northern Division, ordering remand of the cause to Respondent and the Administrative Agency, filed July 1, 1965, copy appears as Appendix B. (R-152 et seq.)

JURISDICTION

The judgment of the Court below was entered on November 8, 1966. On December 6, 1966, within the time allowed by rule of Court, a petition for rehearing was filed. On February 8, 1967, the petition for rehearing was denied. On February 13, 1967, an order was made staying issuance of mandate pending the filing, consideration and disposition by this Court of a petition for writ of certiorari providing such petition is filed in the Clerk's office of this Court on or before March 10, 1967. This order also provided that in the event this petition for certiorari is granted, the stay is to continue pending the final disposition of this case by this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether an order remanding a cause to an administrative agency for correction of procedural errors is a final

decision within the meaning of 28 U.S.C. 1291 when that Order of Remand is entered without completely adjudicating other major issues in the cause on their merits.

2. Whether an Appeals Court is authorized to read into a Notice of Appeal from an Order of Remand (entered without complete adjudications in the lower court on the merits) its jurisdiction to consider all other matters before the lower Court in the proceeding.

STATUTES INVOLVED

United States Constitution—Fifth Amendment

28 U.S.C. 1291, 1292—Jurisdiction of Appeals Court

28 U.S.C. 1361—Action to compel an officer of the United States to perform his duty

28 U.S.C. 1391(e)—Venue of District Courts Generally

Their texts are set forth in Appendix E

STATEMENT OF THE CASE

Petitioners made applications under the Desert Land Act which were accepted and filed by the Manager of the United States Land Office at Sacramento, California. The applications were rejected by respondent's predecessor on the claim that the entries sought covered lands which were not suitable for agricultural development even with irrigation. Petitioners were accorded no hearings of any kind but were allowed to file written representations. The administrative remedies of appeal within the Department of the Interior were pursued to finality without success.

Feeling aggrieved, Petitioners filed an action in the Federal District Court at Fresno, California. Their complaint was based on denial of due process, (R-5) erroneous classification of the lands applied for and in a second cause of action in the complaint petitioners charged discrimination

(R-6) in that similar applications for nearby lands of the same type in the identical government-established soil belt in which petitioners sought entries had been allowed by the respondent at about the same time.

The trial of the cause occurred on June 8, 1965 (see Order of Remand, R-155-Appendix C) but was not had on an agreed statement of facts as erroneously alleged in the Appeals Court decision. Evidence was received as shown in the Order of Remand (R-155-6). The trial was not completed as the Court, in accordance with previous advice to the parties, as soon as the evidence showed the denial of due process, suspended the proceeding and remanded the cause to the respondent and the Bureau of Land Management for the purpose of holding further hearings in line with its decision. The Order of Remand to the respondent and the Bureau of Land Management was not a final decision by the District Court as it left untouched and undecided the major issues of the asserted erroneous classification of the lands involved and those included in the entire second cause of action in which discrimination against petitioners in the disposition of their applications was claimed.

The respondent appealed from the Order of Remand (Notice of Appeal, R-162-3, Appendix D). In due course, the Appeals Court for the Ninth Circuit entered the judgment and opinion of which review is sought in this petition. In this opinion in which the Appeals Court directed the District Court to dismiss the complaint in this cause, the Court did not touch on the question of the appealability of the Order of Remand despite the insistence of petitioners. It treated the Notice of Appeal from the Order of Remand as opening up for its review the entire proceeding as it had developed in the District Court. Petitioners filed a petition

for rehearing in the Appeals Court calling attention to the fact that the decision was based entirely on matters outside of its jurisdiction. The petition was denied on February 8, 1967.

The basis for Federal jurisdiction of this cause in the Court of first instance consisted of the Fifth Amendment of the Constitution of the United States, the Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C. sec. 321 (the Desert Land Act), the Act of June 28, 1934, 48 Stat. 1272, as amended, 43 U.S.C. sec. 315 f (the Taylor Grazing Act), and the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. secs. 1361, 1391 (e).

THE REASONS FOR GRANTING THE WRIT

In disregarding the limitations on its jurisdiction imposed by the Notice of Appeal and the residue of undetermined and undisposed of issues in the District Court, the Court below *impliedly* determined that the Order of Remand was a final decision and in doing so, rendered a decision on a Federal question which conflicts with applicable decisions of this Court.

In *Ford Motor Co. v. NLRB*, 305 U.S. 364, 372 (1939, 6 Cir.) this Court held that a cause involving a review of administrative action could be remanded to the agency for the elimination of procedural errors without relinquishing jurisdiction. Specifically, it was ruled that the reviewing court after ordering a remand to the administrative agency, could, under appropriate circumstances, vacate the order, and proceed with its own review, this Court thereby holding that the original Order of Remand was not a final decision. In this case, it should be noted that the remand came at a time when several material issues remained without adjudication in the lower court.

Substantially the same ruling is to be found in *U. S. v. Catlin,* 324 U.S. 229 as well as in *Arnold v. Guimarin Co.,* 263 U.S. 427. (1923).

THE CONFLICT WITH OTHER COURTS OF APPEAL

The Courts of Appeal in the various Circuits have shown great unanimity in holding that a lower court's action must be final and complete before it becomes appealable. Reference is made to only a few of the applicable decisions.

CIRCUIT

Second: *Bigart v. Goodyear Rubber Co.,* 361 F2d 317 (1966)

Third: *Hartford A. & I. Co. v. Interstate Equipment Co.,* 176 F2d 419 (1949)

Fourth: *Arnold v. Guimarin Co.,* 280 F. 338 (1922)

Fifth: *Diaz v. Crom,* 195 F2d 517 (1952)

Seventh: *Smith v. Benedict,* 279 F2d 211
Katzenbuhler v. Talbot, 132 F2d 192 (1942)

Ninth: *Petersen v. Sampsell,* 170 F2d 555 (1948)
Kelling Nut Co. v. National Nut Co., 145 F2d 418 (1944)
School Dist. #5 v. Lundgren, 259 F2d 101
Bass v. Olsen, 327 F2d 662 (1964)

Tenth: *Long v. Union P.R. Co.,* 206 F2d 829 (1953)

District of Columbia: *Fleming v. Van Der Loo,* 160 F2d 905 (1947)

Apparently, the decision sought to be reviewed by this petition conflicts with decisions in virtually all other Circuits, including its own.

CONCLUSION

It is respectfully submitted that the conflicts between jurisdictions as shown reveal matters meriting consideration by this Court and that this petition for certiorari should be granted.

Dated: March 10, 1967

EDSON ABEL
P.O. Box 396
Middletown, California 95461
Attorney for Petitioners